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REVIEW AND CRITICISM OF ANTI-TRUST LEGISLATION

ADDRESS BY FRANCIS G. NEWLANDS,
United States Senator from Nevada.

MR. CHAIRMAN, LADIES AND GENTLEMEN: I must confess that when I entered this large hall I was a victim of surprise. I had been invited to attend a meeting of the American Academy of Economists, and I supposed that I was to share in a conference upon this important subject with gray-haired and hard-visaged economists. You can imagine, therefore, my astonishment when I was ushered into this large auditorium, graced as it is by the presence of the ladies. However, the ladies are rapidly becoming statesmen, and we politicians, who are struggling to become statesmen, must take them into account. And so, though I must confess I would prefer a lighter subject, I will commence my remarks, trusting that, though dry, they will be instructive.

I am a member of the Senate Committee on Interstate Commerce, and some months ago we entered, under a resolution of the Senate, upon a consideration of the question as to whether further legislation regarding the regulation of interstate commerce was necessary or desirable and we have been having continuous sessions ever since. Lawyers, publicists, economists and business men of distinction have appeared before us and we have collected some three thousand pages of hearings upon this question. I must confess that as we advanced in the inquiry the members of the committee have become more and more confused as to what they should do. The matter seemed very simple at the start; it seems very difficult and complex now. And I must say that since the hearings have been closed, the discussions of the committee have not tended towards harmony of action. This trust question has been presented to us in various shapes. Some insist upon national incorporation, some insist that we should amend the Sherman anti-trust law by defining in the statute what the term reasonable or unreasonable, as used by the Supreme Court means, that we should by the statute declare certain presumptions, and that we should, by statute, declare certain

evidence to be conclusive evidence of a conspiracy in restraint of trade. We have also had suggestions that we should, by legislation, prescribe the conditions under which state corporations should engage in interstate trade, and we have suggestions that we should go so far as to prevent state corporations engaged in interstate trade from continuing to engage in such trade, unless the laws of the states under which they are organized are changed in such a way as to conform to the national conditions, thus establishing by national legislation, the reform of the state incorporation laws, and producing harmony of legislation so far as the states are concerned throughout the union.

Now, with reference to national incorporation, advocated so ably by the President and the Attorney-General and by the Secretary of Commerce and Labor, I have to say, that, though a democrat, I have not looked with hostile eyes upon legislation of that character, but I was disposed to confine it entirely to corporations engaged in transportation between the states. I thought that it was necessary, in a broad and general way, to facilitate the organization of these great systems of railways extending from ocean to ocean and from the lakes to the gulf, with their various branches, under a national incorporation act, and I had the temerity to introduce a bill upon that subject some years ago. I was never prepared to extend national incorporation to the great trading and industrial organizations of the country, because as almost all corporations engage in both state and interstate commerce, I feared that the nation would absorb the entire function of creating corporations. But even with that limited bill I had little success. I found it opposed by conservative republicans who believed in the large exercise of the federal powers, but who perhaps felt that the nation acting collectively upon these great organizations might secure a more efficient control over them than under the divided sovereignty under which they now rest. And so far as the democrats are concerned, I found that their disposition to restrict the powers and functions of the national government, as contrasted with the powers and functions of the states, prevented them from considering even so desirable legislation, the economic benefit of which all must concede. I found that they were jealous of the exercise of national powers, particularly in the southern states, that they wished the corporations to be state corporations, in order that their police powers should have full control. I found the Jim

Crow cars no inconsiderable factors in the determination of this question. For the people of the southern states are adjusting this race question according to their own views, and they fear that if the railway corporations shall be organized under national charters there may be an attempt to enforce some degree of equality in social life, as between the two races. So I came to the conclusion that even with reference to so desirable a thing as nationalizing our great transportation lines, national incorporation would, for the time being, be a difficult accomplishment. That difficulty of course increases when you propose to extend it to commercial corporations, particularly in view of the fact that the democratic party whose traditions are opposed to it has been gaining in power and strength in Congress, and has now secured the control of the lower house, and is rapidly approaching the control of the upper house. Courtesy prevents me from indulging in any prognostications as to the executive office. So I feel that whatever may be said from the economic point of view regarding national incorporation, it must drift out of consideration as a present problem that is capable of approximately near accomplishment.

Most of the witnesses who appeared before us, I may say nine-tenths of them, insisted that the Sherman anti-trust law should not be changed. A few, as I have already stated, believed in supplemental legislation, defining, raising presumptions, giving conclusive effect to certain proofs. Legislation of this kind has been urged by Senator LaFollette, and most ably presented by Mr. Brandeis, of Boston. I do not think, however, that there is any prospect of any alteration in the near future of the terms of the Sherman anti-trust law, nor do I believe that any legislation of a supplementary character will be indulged in. The legislation of the future will be legislation prescribing the conditions upon which state corporations may engage in interstate trade.

Among these bills is the one referred to by the Attorney-General, the bill of John Sharp Williams, the gifted Senator from Mississippi. I must say that, coming as that did from our states' right democrat, it is a gratifying proof of the growth of the view that a larger exercise of national powers is necessary in order to meet this great economic question; for I must say, when Mr. Williams appeared before us and presented his able argument in favor of this bill I was amazed, for it not only fixed the conditions upon which state corporations should

engage in interstate trade, but he provided in his bill that no state corporation should engage in interstate trade unless the state law under which it was organized complied with the conditions of the national legislation which he was urging, conditions which would bar holding companies, bar interlocking directors, bar all corporations organized under the loose modern legislation of the states, and which would entirely revolutionize such legislation. I was pleased, however, with this, as an indication of the growth of the view that national powers should be more extensively exercised, because I recalled that some years ago, at the great Memphis waterways conference, at which you will recollect President Roosevelt made so dramatic an appearance, I was called upon to speak regarding my favorite theme at that time, the national incorporation of great railway and water lines with a view to promoting interstate and foreign commerce, and that Mr. Williams sat some few seats from me, and that as I advanced with my views, a sad melancholy came over his face, and that he sat there during my entire speech shaking his head profoundly in dissent. I thought it was a very gratifying evidence of a gradual liberalizing of views upon the subject, among my democratic friends from the south, that this leading democrat should present a bill of so national a character which has appealed so to the judgment of the Attorney-General. But a surprise met me upon this question in the Committee on Interstate Commerce, and I feel as though I were giving away some secrets of the executive session. I found that whilst the democrats were advancing in their willingness to assert and exercise national powers, some of my republican friends on the committee were disposed to retreat, and I heard several of them declare that they could never go so far in invasion of the functions and powers of the state as Mr. Williams was willing to do. So you see the difficulties of the politicians struggling to be statesmen. Ladies, beware!

Then we had another bill before us, Mr. Cummins' bill, Senator Cummins of Iowa, a bill in which he prescribes the conditions upon which state corporations shall engage in interstate commerce, prohibiting, as Mr. Williams' bill does, many existing practices, such as the holding company, interlocking directors, and also reaching out for the question of size in corporations; for whilst many contend that mere size itself does not constitute restraint of trade, we all know that when a giant is walking amongst pygmies, the pygmies do not

assert themselves with very much valor. And so, insisting that mere size itself may become a menace to interstate trade and destructive of competition, Senator Cummins in his bill, tries to reach that in effect by a commission, which, under rules fixed by the bill, will determine whether a corporation is sufficiently big in its capital or sufficiently big in its operations, to constitute a menace to the commercial life of the country.

Last, but I should like to say not least, is the measure which I introduced, the first bill, I believe, introduced upon this subject, immediately after the decision of the Supreme Court in the Standard Oil case, acting upon a contention which I have made for years ineffectively upon the floor of Congress, but which is now gradually gaining an audience, that we should create a great interstate trade commission, with powers over interstate commerce similar to those possessed by the Interstate Commerce Commission over interstate transportation, without the power, I may say parenthetically, to fix prices, as my friend Gary and my friend Perkins would like us to do. That bill proposes that we should merge the Bureau of Corporations into a great interstate trade commission, similar to the Interstate Commerce Commission, of which commission the chief of the Bureau of Corporations shall be a member, and that the entire staff and powers and functions of the Bureau of Corporations shall be transferred to that commission, thus by a process of evolution, gradually expanding the operations of the Bureau of Corporations, turning it from a mere bureau of investigation, reporting to the President, into a great administrative and corrective tribunal, with powers of publicity, with powers of investigation, with powers of correction and with powers of recommendation to Congress as to new legislation; and also with the power to aid the courts in carrying into effect their decrees for the disintegration of existing trusts, and their reorganization into less objectionable forms; and also providing that corporations may of their own motion appear before this commission, and after presenting fully the form of organization, the methods of doing business, submit to the judgment of the tribunal as to whether their organization contravenes the Sherman anti-trust law, and then correct their organization and their practices pursuant to the determination of the commission. I felt that if this bill should pass, we should have, not a revolutionary readjustment of the industries of the country, but a gradual readjustment to the Sherman law and to

other laws which might hereafter be passed, that instead of exercising the punitive powers of the government over the officers of these corporations which had been built up in the period of thirty years under conflicting views of the meaning of the act, we could, by a process of gradual correction in the courts and gradual correction in this administrative tribunal itself, build up a great body of administrative law regarding corporations and industrial and commercial operations, such as has been built up by the Interstate Commerce Commission regarding interstate transportation. For years I have contended that if, at the time the anti-trust law was passed, the passage being almost contemporaneous with that of the Interstate Commerce Act regarding railroads, we had organized an interstate trade commission similar to the Interstate Commerce Commission, the action of that commission would have prevented many of those abuses which have since grown up and that gradually we would have evolved a system of commercial law through administrative processes as perfect as that which has been built up regarding our system of transportation. To-day, as a result of the splendid work done by the Interstate Commerce Commission, a work regarded at the start with distrust and met by the opposition of the great railway interests of the country, we have reached a condition of things where the railroads are practically out of politics and the administration of the law by that great tribunal, a free and independent tribunal, not subject to the imputation of politics, not subject to executive interference, has resulted in satisfying the just expectations of the people, and has won the confidence of the railway managers themselves. I was a member of the Interstate Commerce Committee when we were considering many important changes, enlarging the powers of that commission from time to time; and upon every occasion we were met by the melancholy foreboding of the railway managers who predicted the destruction of railway interests and the prostration of the entire system of transportation; and yet only recently these very railway managers have appeared before our committee and have declared that upon the whole, the changes that had been made have been beneficial and not prejudicial to the railroad interests of the country. We want peace. We want peace in our system of transportation, and we have nearly secured it. We want peace in our great industrial system, and we are far from it. And the reason we have not peace to-day with reference to industries as we have

practically with reference to transportation, is because Congress did not, twenty years ago, give to the industries of the country the commission which was accorded to the transportation of the country.

Now, my friends, I regret to say that I find in the committee less disposition to report that bill than when our meetings commenced. I must say I have been surprised by it, for at the very start I had an informal expression from the majority, I may say nearly all the members of that committee, that they thought this idea of the creation of an interstate trade commission was excellent. I thought it ought particularly to impress the judgment of men, because we are now engaged in the evolution of economic thought upon this subject. Two rival schools, to which the Attorney-General has referred, exist, one believing in regulated combination, the other in unrestricted competition. Now that war is going on. No one can tell to-day how the people of the United States, with whom the ultimate verdict rests, are going to decide that question. Great social movements are going on throughout the world. But I fear I have trespassed too much upon your time and I will simply stop. Being so interested in my subject and so pleased with the attention of the audience, particularly of the ladies, I found myself led away, and pursued the usual habit of the Senate, which is toward discursiveness. I will simply close by saying that this commission would give an opportunity to these two contending schools of thought to fight out their battle. Meanwhile it would go along by the patient processes of investigation, publicity, correction and recommendation to build up the body of administrative law that would be serviceable whichever one of these theories ultimately prevails. The confusion of politics to-day may have something to do with the confusion of our minds in Congress regarding this important question. I trust the action of the people in the next election will be such (and I have no partisan meaning in this) as to clarify the atmosphere and clarify the minds of the statesmen, for their minds can only be clarified by a vigorous application of public opinion.